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No. 84-1018

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

U.S. TRUST COMPANY OF NEW YORK, INC.,
J. GREGORY VAN SCHAACK and
BRUCE P. DENNEN,
Cross-Petitioners,

v.

AUGUSTIN J. SAN FILIPPO and
THE HONORABLE ROBERT M. MORGENTHAU,
District Attorney for the County of New York,
Cross-Respondents.

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION OF CROSS-RESPONDENT AUGUSTIN J. SAN FILIPPO

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TABLE OF AUTHORITIES

Cases: Page

Briscoe v. *LaHue*, 460 U.S. 325 (1983) 2

Vogel v. *Gruaz*, 110 U.S. 311 (1884) 3

Miscellaneous:

R. Stern and E. Gressman, *Supreme Court Practice* 477 (5th ed. 1978) 2

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The opinion and judgment of the Second Circuit have but two components: (1) a rejection of Cross-Petitioners' absolute witness immunity claim (Pet. App. 19a), and (2) an acceptance of Cross-Petitioners' claim that the Cross-Respondent's "conclusory allegations of conspiracy" are "insufficient to state a valid claim for relief under §1983" (Pet. App. 20a-22a). The Second Circuit, having dismissed Cross-Respondent's suit on this latter basis, held that "we need not discuss the other arguments raised by defendants

[Cross-Petitioners] in support of summary dismissal and rejected by the district court" (Pet. App. 23a).

The Second Circuit thus did not consider any of the claims involved in Questions 2, 3 or 4 of the Questions Presented in the Conditional Cross-Petition. In other words, the Second Circuit did not resolve any questions as to whether malicious prosecution is actionable under §1983, whether the §1983 action should have been dismissed because "the acts complained of were tortious under state law," or whether the §1983 action should have been dismissed as untimely under New York law. Those were matters decided adversely to the Cross-Petitioners by the District Court. But this Court's certiorari jurisdiction under §1254(1) runs only to decisions by courts of appeals, not to decisions of district courts. And the fact that the Second Circuit had no occasion to address those matters on the appeal undermines the jurisdictional premise of the Conditional Cross-Petition as to Questions 2, 3 and 4 – *i.e.*, a Cross-Petitioner must be in the position of asking this Court "to overturn portions of the [Second Circuit] judgment below which are unfavorable to him." R. Stern and E. Gressman, *Supreme Court Practice* 477 (5th ed. 1978).

Question 1 presented by the Conditional Cross-Petition, however, stands on firmer jurisdictional grounds. The Second Circuit did decide the issue of absoltue witness immunity adversely to the Cross-Petitioners. The immunity claim was rejected on the basis of an interpretation of *Briscoe* v. *LaHue,* 460 U.S. 325 (1983), which the Second Circuit said "was expressly limited to immunity for testimony given in judicial proceedings, and its rationale – to encourage witnesses to come forward with all they know – does not justify extending that immunity to cover extra-judicial conspiracies [such as here alleged] between

witnesses and the prosecutor to give false testimony." Pet. App. 19a.

The Cross-Respondent believes that the Second Circuit's decision on this immunity claim, which affirmed a rejection of the claim by the District Court, is so plainly correct as to warrant no further review by this Court. The alleged conflict with a 100-year-old precedent of this Court, *Vogel* v. *Gruaz,* 110 U.S. 311 (1884), does not suffice. That timeworn case did not involve an alleged conspiracy to present false testimony to the grand jury and to withhold exculpatory evidence therefrom. *Vogel* was concerned with a communication made by an individual to a state's attorney, a statement held to be "absolutely privileged" so as to excuse the state's attorney from testifying thereto in a private suit for libel damages against the individual who spoke to the state's attorney.

However, should this Court grant certiorari and include within the grant the third Question Presented in the Petition – the appealability under the collateral order doctrine of the denial of the claim of absolute witness immunity – the existence and viability of such absolute immunity may be said to be a "subsidiary question fairly included" and comprised within the third Question Presented. Rule 21.1(a). In that event, there would be no need to grant the Conditional Cross-Petition on this point, although it would be appropriate to hold the Cross-Petition until the questions presented in the Petition have been resolved.

CONCLUSION

For these reasons, Questions 2, 3 and 4 presented in the Conditional Cross-Petition should be denied review, while Question 1 should be denied review only if the Court limits the grant of certiorari to the "pendent appellate jurisdiction" issue presented in Questions 1 and 2 of the Petition.

Respectfully submitted,

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